

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

* * * * * 22-CV-246-JJM
*
OCEAN STATE TACTICAL, *
LLC, et al *
*
VS. * NOVEMBER 3, 2022
*
STATE OF RHODE ISLAND, *
et al *
* PROVIDENCE, RI
* * * * *

BEFORE THE HONORABLE JOHN J. McCONNELL, JR.

CHIEF JUDGE
Courtroom 1

(Motion for Temporary Restraining Order))

APPEARANCES:

FOR THE PLAINTIFF: MICHAEL A. KELLY, ESQ.
DANE EVAN ARDENTE
Kelly, Souza, Rocha & Parmenter
128 Dorrance Street, Ste 300
Providence, RI 02903

FOR THE DEFENDANT: SARAH RICE, ESQ.
RI Department of Attorney
General
150 South Main Street
Providence, RI 02903

Court Reporter: Denise P. Veitch, RPR
One Exchange Terrace
Providence, RI 02903

1 3 NOVEMBER 2022 -- 2:00 P.M.

2 THE COURT: Good afternoon, everyone. We're
3 here on Plaintiffs' request for a temporary restraining
4 order and a preliminary injunction in the case of
5 Ocean State Tactical, LLC, et al v. The State of Rhode
6 Island, criminal action 22 -- I'm sorry -- civil action
7 22-246. Would counsel identify themselves for the
8 record, please.

9 MR. KELLY: Michael Kelly for the Plaintiffs,
10 your Honor.

11 THE COURT: Good afternoon, Mr. Kelly.

12 MR. KELLY: Good afternoon.

13 MR. ARDENTE: Dane Ardente for the Plaintiffs,
14 your Honor.

15 THE COURT: Good afternoon, Mr. Ardente.

16 MS. RICE: Sarah Rice, Special Assistant
17 Attorney General, for the Defendants.

18 MR. HOFFMAN: Keith Hoffman, Special Assistant
19 Attorney General, for the Defendants.

20 THE COURT: Great. Welcome, all.

21 Mr. Kelly, it's your motion. And while you're
22 coming up, I've told counsel this, for those watching,
23 we're limiting arguments to no more than 45 minutes,
24 either side. Split, if you want to split it or not,
25 it's all up to you. We're going to stay very strict to

1 that because an hour and a half is as long as our court
2 reporter can go in any one sitting.

3 So, Mr. Kelly, the floor is yours.

4 MR. KELLY: Thank you, your Honor.

5 THE COURT: Mr. Kelly, were you tested before
6 you came in?

7 MR. KELLY: Yes.

8 THE COURT: And I assume it was negative.

9 MR. KELLY: Yes.

10 THE COURT: So you're welcome to take your mask
11 off if you were vaccinated and tested.

12 MR. KELLY: Good afternoon, your Honor.

13 THE COURT: How are you?

14 MR. KELLY: Michael Kelly for the Plaintiff.

15 And I'm sure you're well aware of the issue before the
16 Court, and that is whether or not the so-called
17 magazine ban enacted by the Legislature in July of this
18 year violates the Second Amendment and/or the Fifth
19 Amendment which applies to the state through the
20 Fourteenth Amendment. And it's been the subject, this
21 issue has been the subject, as I'm sure you know from
22 reading the briefs of extensive litigation, and there
23 were approximately seven or eight pending cases before
24 the Supreme Court of the United States at the time it
25 decided the *Bruen* case, which has changed the landscape

1 in regard to the analysis of the Second Amendment, and
2 making it a historical review as opposed to other of
3 the second step which was applied in the *Heller* and
4 other cases as to whether or not the so-called firearm
5 in fact was protected and were there public reasons for
6 such an enactment.

7 Now, the statute itself provides that as of
8 December 18th that the -- I'm going to call them
9 large-capacity magazines, and that's over 10 rounds,
10 and I'm going to be referring to standard-capacity
11 magazines as those that are issued with the gun.
12 Typically when you buy a firearm it comes, of course,
13 with a magazine. That's the only way you can shoot it.

14 THE COURT: Mr. Kelly, can you help me on that
15 because I was looking at this earlier. Are there guns
16 that are manufactured that have an in-place magazine
17 capacity in excess of 10?

18 MR. KELLY: Most guns these days have magazines
19 that exceed 10.

20 THE COURT: Okay. But is the magazine a
21 permanent part of the gun, or is it a replaceable
22 cartridge, so to speak?

23 MR. KELLY: If I may, your Honor.

24 THE COURT: I was kind of queueing up your
25 show-and-tell.

1 MR. KELLY: It's not much of a show-and-tell,
2 but if I may --

3 THE COURT: First of all, have you shared it
4 with the State's counsel?

5 MR. KELLY: Yes.

6 THE COURT: Mr. Kelly was kind enough to check
7 with us and Marshals Service before he brought this in,
8 which we appreciate.

9 MR. KELLY: The magazine such as that which are
10 made of plastic, at this time most of these type of
11 magazines, that's for an AR-15, are plastic, and which,
12 as you'll hear, presents quite a problem in terms of
13 how you permanently modify a plastic magazine. But
14 there are, as you'll hear and as I'll present through
15 some affidavits, most guns these days come with a
16 magazine that exceeds 10 rounds, and there are several
17 if not many firearms where there is no available
18 magazine of 10 rounds or less. Either they're not made
19 or you cannot obtain them at this time, which gets to
20 the issue of whether it's a firearm, which I will
21 address in detail later on.

22 So it has to be either permanently modified. As
23 you know, there are no regulations, criteria whatsoever
24 in regard to what "permanently modified" actually
25 means; or it can surrender the magazine, one can

1 surrender magazines to the police department or
2 transfer to a federally-licensed firearm dealer. That
3 is the extent of what has to be done with these
4 magazines. As you can see, the fact that there are
5 many that are in fact plastic presents quite a problem,
6 particularly with no criteria whatsoever.

7 THE COURT: Well, as to that aspect, I mea,
8 there's other options that the owner has; right?
9 Modifying is one of them, sending it to a licensed
10 dealer, sending it to, turning it in to the
11 authorities, so it is --

12 MR. KELLY: Yes, your Honor. Excuse me. And we
13 presented some affidavits as to why those options
14 frankly not options at this point. I'm sure you well
15 know what the standard is for this type of relief,
16 preliminary injunction, which is likelihood of success
17 on the merits, irreparable harm, and balancing of the
18 hardships. Excuse me.

19 Now, prior to the *Bruen* case there was a
20 two-step analysis of whether a firearm in fact was
21 protected by the Second Amendment, and the criteria
22 used was established as a challenge that law regulation
23 regulates activity falling outside the scope. If it
24 fell beyond the scope it was categorically unprotected.
25 However, in the *Walberg* (indecipherable) right, in the

1 Second Amendment there was a strict scrutiny test in
2 which basically it was narrowly tailored to compel, to
3 serve a compelling government interest, and there was
4 also intermediate scrutiny as to whether the government
5 could show the law was substantially upgraded to the
6 achievement of an important government interest.

7 *Bruen* changed all of that. *Bruen* indicated that the
8 courts have gone one step too far. If it's a
9 regulation that's inconsistent with the plain text of
10 the Second Amendment, it impermissibly burdens the
11 Second Amendment after historical analysis as to
12 whether the firearm was previously regulated in the
13 Founding Era, which is when the Second Amendment was,
14 in fact, adopted. However, no matter what the
15 regulation is, it cannot overcome the plain text of the
16 Second Amendment.

17 THE COURT: So Mr. Kelly, let's stop right
18 there, and it seems to me that the issue of the plain
19 text analysis is where we begin, the court tells us,
20 the *Bruen* court tells us, and it seems to me the
21 singular issue there for our analysis for purposes of
22 this case is is a magazine an arm or is it an
23 accoutrement, an accessory; and assuming that you agree
24 with me that that's kind of the first level of the
25 textual analysis, what is the Plaintiff's position as

1 to the distinction between an arm and an accoutrement
2 and why is it your position that a magazine is an arm
3 textually?

4 MR. KELLY: I would just quote the Supreme Court
5 case of *Jackson* where the Supreme Court indicated
6 through Judge Thomas quoting that case, (Reading)
7 Without bullets, the right to bear arms would be
8 meaningless and indeed a regulation eliminating a
9 person's ability to obtain or use ammunition would
10 thereby make it impossible to use their firearms for
11 their core purpose.

12 Now, there was at the time of the *Bruen* decision
13 over six cases pending before the court had come up
14 from the various circuit courts and that challenged the
15 possession of large-capacity magazines, and, in fact,
16 in each of those cases the courts had done the analysis
17 in regard to whether it was protected by the Second
18 Amendment and therefore all those cases reviewed the
19 Second Amendment and the magazine as if it were a
20 firearm based upon the fact that without the magazine
21 the gun can't be shot and the fact that you have to
22 have bullets, obviously, to shoot the gun; and those
23 were the *Duncan and Barton* case, the *Association of*
24 *Jersey Rifle and Pistol Clubs v. Bruck*, the *Kolbe v.*
25 *Hogan* case, *Friedman v. City of Highland Park*,

1 *Bianchi v. Frosh*, and *Young v. Hawaii*. So in all those
2 cases both the district court and the courts of appeals
3 held that it was, that the magazine was in fact a
4 firearm and did the analysis in regard to whether the
5 magazine was protected by the Second Amendment.

6 THE COURT: Those cases didn't determine that.
7 They accepted the argument as part of the legal
8 argument that the magazine was subject to the arms
9 textual analysis. They didn't hold after a hearing
10 that a magazine is an arm, did they? I mean that's my
11 understanding of what --

12 (Overlapping speech)

13 MR. KELLY: They didn't specifically hold that
14 clearly as you just enunciated, but they analyzed it
15 under the Second Amendment. It seems to me, just as
16 we've done today, the first step is to determine
17 whether it's a firearm before you even get to the fact
18 as to whether it's protected.

19 THE COURT: Sure. So define for me the
20 definition, give me the definition of arm that includes
21 magazine, according to the Plaintiff. How does one use
22 that, how does one interpret that word "arm" when
23 determining between an accoutrement and an arm?

24 MR. KELLY: Well, my response to that is that
25 the magazines are provided; they are part of the gun as

1 modern instruments at this point. The Rhode Island
2 statute also defines, and I've got that right here.
3 There it is; thank you. So Rhode Island has its own
4 statute in which they have defined -- excuse me. The
5 case in *Bruen* included all instruments that constitute
6 bearable arms, even those that were not in existence at
7 the time of Founding, and the Second Amendment's
8 definition of arms is fixed according to its historical
9 understanding the general definition covers modern
10 instruments.

11 THE COURT: Say that one more time. It
12 covers -- what did you say?

13 MR. KELLY: The Second Amendment's definition of
14 arms is fixed according to its historical understanding
15 that general definition covers modern instruments to
16 facilitate armed self-defense, citing the *Caetano* case
17 from Massachusetts.

18 THE COURT: But no one has given us guidance,
19 that I've seen, either the First Circuit or the Supreme
20 Court, on how one determines what is an arm versus what
21 is an accoutrement. Because you would agree with me
22 that it's a distinction with a difference; right? That
23 arms falls under the Second Amendment; accoutrements or
24 accessories, depending upon what century you live in,
25 don't; right? You agree with that distinction?

1 MR. KELLY: Yes.

2 THE COURT: Okay. So what's the definition of
3 arms that we should use to determine whether an item
4 like that is an accessory or not? In other words the
5 analogy is, you know, you have a car, that's a car, and
6 then you might have a rooftop on top of it. Is the
7 rooftop, is the luggage carrier a car, or is it an
8 accessory to the car? So how do I determine which it
9 is?

10 MR. KELLY: Well, I would just go back to the
11 definition used in *Bruen*. The modern instrument as
12 defined as -- covers, Second Amendment, modern
13 instruments to facilitate armed self-defense. As I
14 previous stated and as set forth in our affidavit from
15 Mr. Worthy and others, the magazine in fact is
16 necessary to fire the gun and in fact it therefore
17 facilitates the arm of self-defense.

18 In addition, the Rhode Island General Laws
19 Title 11 Chapter 47 titled Weapons very strongly
20 implies that magazines are weapons and regulates them
21 as weapons. It refers to chapter -- Section 51, Loaded
22 Weapons in a Vehicle, it indicates that it is unlawful
23 for any person to have in his or her possession a
24 loaded rifle or loaded shotgun or rife or shotgun from
25 the magazine of which all shells and cartridges have

1 not been removed.

2 So the magazine in that statute is indicated to
3 be a part of the weapon due to the fact that it cannot
4 have any shells in the magazine or it's considered a
5 loaded weapon. It also goes on to, it says that other
6 objects separately from the weapon or firearm, in fact,
7 are covered as weapons. So I believe that that
8 statute, common sense reading, indicates that the state
9 statute considers the magazine part of the gun.

10 And as I said, the courts have all reviewed the
11 magazines to determine whether or not under the Second
12 Amendment whether they're covered.

13 THE COURT: Well, Mr. Kelly, let's flip to the
14 second preliminary question which you raised in one of
15 your quotes, which is, do you agree that the Second
16 Amendment only applies to arms used in self-defense?

17 MR. KELLY: No, I don't, your Honor.

18 THE COURT: Okay. Tell me why *Heller* and *Bruen*
19 don't so hold.

20 MR. KELLY: Well, one of the cases, in fact,
21 addresses that issue, and I don't have it right in
22 front of me, but basically the court indicated that it
23 is not just limited to self-defense, but includes
24 sporting and other shooting activities; and, in fact,
25 target shooting is at page 7 of the report that we

1 filed from Ashley Hlebinsky which indicates that target
2 shooting was part of American culture before the
3 formation of the United States with colonists taking
4 part in competitions known as rifle frolics, frolics,
5 and this in fact took place back in the Founding Era
6 and also increased in the post-Civil War.

7 THE COURT: But Mr. Kelly, even now -- or feel
8 free to send me a, you know, letter brief afterwards
9 and show me -- but I was under the impression having
10 read all of the cases that the Supreme Court was rather
11 clear in its limitation on the extent of the Second
12 Amendment to arms for purposes of self-defense. That
13 was the basis of *Heller* and it was incorporated into
14 the *Bruen* case. So if you have a Supreme Court case
15 that says that the Second Amendment applies to weapons
16 outside of for use of self-defense, then I need to know
17 that because that's not my understanding of what they
18 require for the analysis. Again, if you don't have it
19 now feel free to let me know later. But that's the
20 analysis that I am working under and what the Supreme
21 Court requires us to do initially before we even get to
22 the Second Amendment analysis of the historic
23 tradition.

24 MR. KELLY: Very good, your Honor, I will.

25 THE COURT: Okay. Thank you.

1 MR. KELLY: Getting to the analysis under the
2 historic investigation which the *Bruen* court in fact
3 has indicated is the test to be done, pursuant to our
4 report from Ashley Hlebinsky there were none at the
5 time of the Founding Era. There was no regulations
6 concerning the number of bullets that a gun could in
7 fact hold and in fact at that time there were
8 requirements according to the government that each
9 person or able-bodied man, so to speak, be required to
10 carry a musket and a certain amount of rounds for
11 ammunition with him at all times.

12 THE COURT: Can I just back us up, Mr. Kelly, on
13 this because another perplexing part of the Supreme
14 Court's analysis in *Bruen* or the Supreme Court's
15 mandate to district courts and courts of appeal has to
16 do with how do you determine this historic tradition,
17 and it may be one thing if you could look at history
18 and see it's either red or blue and make a
19 determination, but there's clearly analysis that goes
20 into that, and we can see that by competing historical
21 affidavits that say directly opposite things about our
22 history.

23 So my first question to you is what advice do
24 you have under the *Bruen* required analysis on this
25 historic tradition? How does the Court make that

1 determination between competing, potentially competing
2 pieces of evidence? You've chosen, you both -- you all
3 have chosen to present it by way of affidavit which I
4 think is the efficient way to look at it, but how am I
5 to determine who is right on these two affidavits, two
6 competing affidavits?

7 MR. KELLY: A close reading of the Defendant's
8 affidavit in regard to that issue will indicate that
9 there were no regulations in effect in the Founding Era
10 for the number of rounds of ammunition that any type of
11 weapon could in fact hold.

12 THE COURT: Right. But the State's affidavit
13 says that as of at least into the 1700s there were no
14 firearm, there were no arms that required -- that
15 allowed multiple shootings without reloading, so one
16 would be -- if you follow the State's expert, one
17 wouldn't be surprised that there's no regulation
18 prohibiting that which doesn't exist.

19 MR. KELLY: That is not the case, your Honor.

20 THE COURT: I know, but I just want to get to my
21 initial question, and I won't beat a dead horse here,
22 but how am I to determine, how am I supposed to
23 determine under this new *Bruen* mandate between
24 competing affidavits? You know, Judge Carlton Reed
25 down in Mississippi yesterday, a couple of days ago

1 issued an opinion on this very issue, talking about the
2 difficulty that district courts will have under the
3 *Bruen* mandated analysis and it was actually looking at
4 appointing a court expert to come to that
5 determination. Is there a way -- am I to judge
6 credibility between the affidavits and, if so, how?

7 MR. KELLY: Let me suggest this, your Honor, if
8 I may. At page 10 of our expert's report she cites
9 several examples of so-called repeaters that were in
10 effect as early as the 1750s that at least one was a
11 12-shot repeater made by gunmaker John Shaw in Boston;
12 and then there was two or three others that have been
13 mentioned here, the Belton rifle, which actually a
14 hundred of those were ordered by George Washington for
15 the Continental Army, and then a few decades later,
16 around 1779 an air rifle was developed which held
17 22-rounds from a tubular magazine, and that was
18 actually used by Lewis and Clark in their expedition.

19 I think it would be very easy for the Court to
20 determine if in fact those were in effect by
21 checking -- that those were in existence by checking
22 the citations that were given. One of them is an
23 advertisement in a newspaper and others are reported in
24 the newspaper also. And I believe they're well
25 documented, your Honor, and I think that's the way for

1 one to check to see which expert is in fact addressing
2 that issue accurately; and that is, were there
3 magazines or guns which held more than 10 rounds -- and
4 that's an arbitrary figure, your Honor, of course, some
5 states are eight, some are 10, some are 12 -- and
6 whether or not those guns were in existence. There
7 certainly were no regulations at the time. And I don't
8 believe that the Defendant's expert pointed to one
9 regulation that limited in the Founding Era the number
10 of rounds of ammunition that was restricted for a
11 firearm.

12 THE COURT: Do you think that the state can
13 constitutionally impose any amount of limitation on a
14 magazine, or does it have to be unlimited to meet
15 constitutional muster? What if it were 20 or 30?

16 MR. KELLY: Yes, I think that they have a
17 problem regulating these magazines based upon
18 historical analysis because in fact, as I've just said,
19 there were about four or five guns in existence in the
20 Founding Era, 1750s through 1770s that in fact held
21 more than 10 rounds. Some held up to -- the Giardoni
22 rifle which I mentioned held 22 rounds.

23 THE COURT: The State's expert says that except
24 for weapons of war -- that they were, that multiple
25 round arms at that period was an uncommon weapon of

1 war, as opposed to for public use.

2 MR. KELLY: Obviously -- I do not believe there
3 were any actual citations to that reference and, as
4 I've indicated, there were multiple rifles available in
5 that time period which had more than 10, more than 12
6 rounds of ammunition. And there were no regulations.
7 They don't point to a regulation. So I think that the
8 Court could easily determine the issue by checking to
9 see whether or not the citations and the sources here
10 that we've cited at page 10 of our report in fact are
11 correct, and I believe that they would be easily
12 documented.

13 George Washington wrote a letter in 1776 asking
14 that the Continental Congress order a hundred Belton
15 rifles. 1779, the Girardoni was created. To my
16 knowledge there wasn't a war going on at that point.
17 And, as I said, it was used by Lewis and Clark on their
18 expedition, certainly not a war.

19 THE COURT: Mr. Kelly, under your client's
20 analysis, could the State ban machine guns?

21 MR. KELLY: Pardon me?

22 THE COURT: Could they prohibit machine guns?

23 MR. KELLY: Yes, because that's a completely
24 different animal than we're talking about. Machine
25 guns are different because they're automatic. You pull

1 the trigger once and it keeps firing until it's out of
2 ammunition. The large-capacity magazines that we're
3 talking about are used in semi-automatics which you
4 have to pull a trigger each time.

5 THE COURT: Right.

6 MR. KELLY: And to tell you the truth, I'm a
7 shooter; there are many individuals that can change
8 that magazine in a matter of two or three seconds. So
9 I would suggest that the difference between that type
10 of conduct and having 20 bullets in a magazine is not
11 that different.

12 THE COURT: Well, the evidence in common logic
13 tells us the two or three seconds could save two or
14 three children in a crowded classroom.

15 MR. KELLY: That's speculation.

16 THE COURT: It's common sense. It takes a
17 couple of seconds at a minimum to reload. The chance
18 that a child can run or duck or hide, I think I could
19 almost take judicial notice of that as a fact.

20 MR. KELLY: I stand by my statement, but I
21 understand, I understand the issue, your Honor.

22 THE COURT: Okay.

23 MR. KELLY: And under this historical analysis
24 the regulation or the law that one would be pointing to
25 as a basis for a regulation, it's got to be relevantly

1 similar, which is evaluated under two metrics; and that
2 is, the regulation burdens law-abiding citizens have
3 the right to armed defense, and then there's the
4 whether modern and historical regulations impose
5 comparable burdens in the right to armed defense --
6 which here there are none, in our opinion -- why the
7 regulation burdens law-abiding citizens the right to
8 armed defense and whether that is comparably justified.

9 There's been a conflict between some of the
10 scholars trying to compare later day regulations such
11 as the one you just referred to on machine guns, which
12 were not enacted until the 20s when we had quite a few
13 gangsters around the country using these machine guns.
14 And if you look at the National Firearms Act which
15 regulates machine guns, it does not limit capacity. In
16 other words whether it's a machine gun or not is not
17 dependant on the number of rounds of ammunition that it
18 can hold; it's on the firing mechanism which is
19 automatic, which certainly is something that's far
20 different than a semi-automatic or a pistol, et cetera.
21 Actually pistols these days come with almost like a
22 magazine, you pop the area which, the round cylinder
23 which holds the bullets, the whole thing pops out, you
24 pop one in. So the technology has moved along. And as
25 the scholars have all agreed, but that doesn't mean

1 that these magazines using the new technology, guns
2 using new technology are not covered.

3 As I said, the Founding Era there were several
4 guns in existence which held more than 10, 12 rounds,
5 and I've given you several examples of those. I won't
6 repeat myself. There was --

7 THE COURT: Mr. Kelly, can I interrupt for a
8 second again and go back to the machine gun analogy,
9 and I understand the difference between a machine gun
10 and a semi-automatic -- that's the difference in terms
11 of whether a bullet gets sent out or not. But why is
12 that a distinction that matters for constitutional
13 analysis? What is it about the trigger that makes it
14 okay to -- or the lack of trigger that makes it okay to
15 regulate, but the trigger itself is regulatable?

16 MR. KELLY: Because it shoots much faster. A
17 machine gun shoots much faster. As I said, it's
18 automatic.

19 THE COURT: So the State can regulate arms if
20 they shoot bullets too fast?

21 MR. KELLY: Well, I think that the analysis for
22 the machine guns is is it a dangerous and unusual
23 weapon; and obviously the statutes that regulate those
24 type of arms, they were intended to prevent the, having
25 an automatic weapon that could continuously fire. And

1 as I said, the statutes, the National Firearms Act does
2 not focus on capacity, so capacity is not part of the
3 definition of machine gun. It's the type, how it can
4 shoot.

5 THE COURT: Right. But again I don't want to
6 beat a dead horse, but so what for constitutional
7 analysis, and why is that part of the legal analysis?
8 Why is that a legal distinction that has any relevance
9 to what the *Bruen* court tells us we should be looking
10 at?

11 MR. KELLY: Because it's an unusual and
12 dangerous weapon, even if --

13 THE COURT: Because it expels bullets fast.

14 MR. KELLY: Much faster than a semi-automatic,
15 yes.

16 THE COURT: Okay. So the constitutionality
17 turns on the degree of speed of the bullet?

18 MR. KELLY: No, it --

19 THE COURT: I'm just trying -- I'm not trying to
20 give you a hard time, Mr. Kelly, honest. I'm trying to
21 figure out legally as we analyze this, it's very
22 complicated and there's not a lot of direction because
23 the Supreme Court just came down with this, --

24 MR. KELLY: I agree.

25 THE COURT: -- so I'm trying to figure out where

1 this all fits into a legal analysis appropriately, and
2 the part, that part I just can't get my head around,
3 where it belongs, one way or the other how it goes.
4 You know what, I don't want to take up all of your --
5 you only have about 10 minutes left, so I'm assuming
6 you want to talk about the takings clause because that
7 intrigues me as well. I don't know if there's anything
8 else you want to say about this before.

9 MR. KELLY: In our brief we address that issue
10 about machine guns --

11 THE COURT: Okay.

12 MR. KELLY: -- and as I said, the machine guns
13 are not protected because they're dangerous and unusual
14 weapons and certainly were not in common use in any
15 way, shape or form either in the 1920s or in the
16 Founding Era, so --. And the examples of dangerous and
17 unusual weapons are M16s which in fact shoot
18 automatically, machine guns, regulation on sawed-off
19 shotguns, hand grenades. And the sawed-off shotguns,
20 as I understand it, was intended to prevent people from
21 carrying those around under their jacket. There were
22 also carry permit laws in -- at the time, but they
23 focused on little carry guns that could be concealed so
24 people couldn't see them. And you have bump stocks,
25 which a bump stock turns a semi-automatic basically

1 into an automatic. So the rationale for that is that
2 as a result of them being able to fire continuously,
3 they were determined to be dangerous and unusual, and
4 dangerous and unusual firearms are not protected by the
5 Second Amendment; and the courts have unanimously
6 upheld that based upon that holding that in fact
7 they're dangerous and unusual. The common use standard
8 was applied to be a standard, to be the large-capacity
9 magazines, and the *New York State Rifle case v. Cuomo*
10 went to the Second Circuit and that's the basis for
11 that, your Honor.

12 Now I've addressed, I believe, the issues of the
13 history. The Second Founding Era, just as we've
14 discussed, although not as important as the Founding
15 Era, the Second Founding Era could give some guidance.
16 In fact, the Defendants cite the Winchester repeater
17 rifle, et cetera, and indicate clearly as an admission
18 there were no regulations restricting Winchester
19 rifles, some of which had 12 capacity, some had 22,
20 et cetera. So even in the Second Founding Era there
21 were no restrictions on capacity. It was the 20s where
22 machine guns, in fact, were considered dangerous and
23 unusual and were regulated. But the *Bruen* case clearly
24 stated that later in time regulations do not affect the
25 historical precedent issue which we've described.

1 The magazines, I would posit to you, are not
2 dangerous and unusual. And once again, the
3 First Circuit has declined to address whether a
4 standard capacity, large-capacity magazines were
5 commonly used or uncommonly used; however, this court
6 held that stun guns were weapons in common use at that
7 time for lawful purposes for self-defense.

8 THE COURT: This Court didn't; my colleague
9 Judge Smith did.

10 MR. KELLY: Yes. I referred to this.

11 THE COURT: Okay.

12 MR. KELLY: And in terms of the number of
13 magazines in existence right now of large capacity, at
14 this point there's about over 20 million ARs owned by
15 individuals in the United States, upwards of 70 million
16 large-capacity magazines for AR-15s; far more than that
17 for the number of other rifles and pistols that have
18 magazines that exceed 10 rounds. And frankly now if
19 one were to take a look at the types of firearms,
20 particularly pistols that are being manufactured with
21 the standard magazine, exceeds 10, there's actually a
22 lot of carry pistols that far exceed 10; they have 12,
23 15, 17.

24 THE COURT: Can I ask you, Mr. Kelly, I know you
25 don't believe that the Second Amendment is limited to

1 arms for purposes of self-defense. Putting that aside
2 for a second, is there any evidence in this record that
3 large-capacity magazines are intended to or have been
4 used for purposes of self-defense, and is it the
5 Plaintiff's position that a gun equipped with a
6 large-capacity magazine is for the purpose of
7 self-defense?

8 MR. KELLY: Well, I would suggest any firearm
9 you have in your home is, can be used for self-defense.
10 Whether people have large-capacity magazines in those
11 firearms is really I would say somewhat irrelevant to
12 the fact that it's a firearm that can be used for
13 self-defense. Whether it's got 20 rounds or 10 rounds
14 or 12 rounds, all of those can be used for
15 self-defense. And as I said, there's a lot of
16 manufacturers and they've been in existence for a long
17 time that there're pistols, and let's assume for the
18 purpose of discussion which I do not agree with, the
19 large number of handguns now come with a magazine that
20 far exceeds 10 rounds.

21 THE COURT: But the mere fact that it comes with
22 it doesn't mean it's for the (indecipherable)
23 self-defense. I would imagine people -- I don't know
24 the shooting sport, but I would well imagine people
25 using guns in shooting might, you know, might want the

1 rapid without reloading ability. Again, I'm just
2 assuming that, but I don't see where it comes around to
3 for purposes of self-defense which, you know, *Heller*
4 began by saying that, I think Justice Scalia said in
5 *Heller* that it was for purposes of self-defense in the
6 home and added the in the home part; and then *Bruen*
7 obviously came forward and took it out of the home but
8 continued with the purposes for personal self-defense.
9 And under your analysis then the language of for
10 self-defense is meaningless, right, because any arm
11 regardless of capacity can be used for self-defense and
12 therefore checks that box; right?

13 MR. KELLY: Well, I wouldn't say any arm. If
14 it's a dangerous and unusual firearm, no, it can't,
15 because it's not protected. However, I would ask what
16 is the difference between one having an AR with a 20
17 round or 25 round magazine, and a pistol that has 12,
18 14, 17 rounds? No one could argue that a pistol is not
19 used or cannot be used for self-defense in the home. I
20 would suggest that's probably that, that shotguns are
21 the most prevalent firearms used for self-defense in
22 the home.

23 THE COURT: But legislation doesn't prohibit the
24 pistol. I don't think it prohibits the magazine.

25 MR. KELLY: Right. As we've indicated in our

1 affidavits, there are many firearms, pistols, that
2 there is no magazine with 10 rounds or less. They
3 don't make them. In fact there's quite a few customers
4 of Ocean State that come in with older guns trying to
5 buy a 10-round magazine and the manufacturers don't
6 make them or the manufacturers aren't in existence
7 anymore, et cetera. So to say that you could use it,
8 just throw in another clip, a magazine into a pistol,
9 that's not true, and none of the evidence indicates
10 that. It's --

11 THE COURT: But it's also --

12 MR. KELLY: -- to the contrary.

13 THE COURT: -- they could make it if there was a
14 market for it, and there could be a market for it if
15 the state limited it. I mean --

16 MR. KELLY: Well, 80 percent of the states do
17 not regulate the number of rounds in a magazine, so
18 what you can do with those -- and whether there's a
19 market for Rhode Island, Connecticut, and Massachusetts
20 and a few others, I don't know.

21 But what I do know from the affidavit we
22 submitted that there are handguns and there are rifles
23 at the present time for which there is no magazine
24 available that complies with this law. It begs the
25 question what does one do with the firearm that they

1 can't get a magazine for? It's worthless. So we would
2 suggest that since the magazine is a crucial part or
3 necessary part of the firearm, whether it's an AR or
4 whether it's a pistol.

5 Now, this statute does not differentiate between
6 either. It doesn't say that pistols can have a
7 magazine larger than 10, and it doesn't say --

8 THE COURT: In fact it says the opposite, they
9 can't.

10 MR. KELLY: That's right, it says they can't
11 have a magazine with more than 10 rounds, and it
12 applies to any firearm. So it is in fact affecting
13 one's right to self-defense with a pistol that has more
14 than 10 rounds, whether it's a pistol or an automatic
15 rifle. And automatic is an oxymoron because they're
16 not, as you know. So I would say just based on that,
17 this affects a core right. So if you don't have a --
18 if you can't get a magazine that complies with the law
19 for whatever firearm, you've been basically
20 dispossessed of your gun and your self-defense. I
21 don't think anyone has looked at it that way, but
22 that's the way I think the Court should look at it. It
23 affects the right to self-defense for the reasons I
24 just stated. Now, why is it --

25 THE COURT: Mr. Kelly, your time is just about

1 up, so if you want to wrap up.

2 MR. KELLY: Yes.

3 I would just like to address the takings issue.
4 We cited the cases that clearly said if the government
5 physically takes possession of personal property, even
6 if it's done under the guise of public good, there has
7 to be compensation. Now, as we've indicated in our
8 affidavits, the gun store, Ocean State, they've
9 indicated, (1) they cannot send any of these magazines
10 back to the manufacturer, they will not take them; (2)
11 they cannot sell used magazines for liability reasons,
12 other dealers will not buy used magazines due to the
13 potential liability if it doesn't work right, it's
14 defective, there's a problem with the gun, et cetera.

15 THE COURT: Mr. Kelly, let's assume that there's
16 a taking -- and I know that's hotly contested and
17 well-briefed -- but I want to jump ahead to the
18 argument of the public safety exception to the takings
19 clause and tell me why this doesn't fall squarely
20 within that.

21 MR. KELLY: Well, I've just indicated that there
22 are cases. I've just cited a case which stands for the
23 proposition that -- that's the *Tahoe-Sierra Council v.*
24 *Tahoe Regional Planning* -- that if the government takes
25 possession of personal property, even if disposed in

1 the guise of public good, there has to be compensation.

2 THE COURT: But that's public good, not the
3 public safety exception. The public good, you know,
4 can be them taking over a Walmart to build a rotary in
5 the road. But the public safety exception is specific
6 to public safety.

7 MR. KELLY: I would say they're one and the
8 same. The public condition and public safety, I would
9 suggest that they're the same. The public condition,
10 if it's a safety issue you're affecting the public
11 condition, et cetera. So I would -- in the *Horne*
12 case Justice Holmes noted "A strong public desire to
13 approve the public condition is not enough to warrant
14 achieving desire by a shorter cut than the
15 constitutional way, regarding condemnation. The
16 district court in *Duncan* held there was a taking, and
17 of course the ban was illegal, and the Ninth Circuit
18 initially upheld the district court on prohibiting the
19 ban, and *en banc* the Ninth Circuit reversed that,
20 although with all due respect, the Ninth Circuit hasn't
21 seen a gun control law yet that they (indecipherable)
22 upheld.

23 THE COURT: I'll have you end on that note.
24 It's brought a smile to my face.

25 And let's hear from the State. I will say that

1 the briefing by all sides on all of the issues was
2 incredibly helpful and incredibly well done.

3 MR. KELLY: Thank you.

4 THE COURT: I truly appreciate that.

5 MR. KELLY: A lot of reading.

6 THE COURT: Yes.

7 Ms. Rice. Do you have your own show-and-tell,
8 Ms. Rice? Do I need to pull up my screen?

9 MS. RICE: Not on the screen, thank you. I do
10 have Mr. Kelly's glasses, which I'm returning to him.

11 And I did want to make care of a little
12 housekeeping off the top if I can. Mr. Kelly -- and I
13 apologize for not doing this in the very beginning --
14 but Mr. Kelly submitted this morning on the docket an
15 affidavit of Will Worthy at 10:00 a.m. and this comes
16 in well after briefing was due. It is cumulative.

17 THE COURT: I haven't seen it.

18 MS. RICE: Okay. So I thought that that might
19 be the case. I would like to put on the record our
20 objection because it is out of time and cumulative.
21 But in the event that your Honor is inclined to admit
22 it, I have an exhibit that goes to one point in that
23 affidavit that I would like --

24 THE COURT: Why don't you do this, Ms. Rice.
25 Rather than take up your valuable time on the meat of

1 your argument, why don't you put that in a notice or
2 pleading and attach what you would. If I do decide to
3 accept it, attach what you would anyways so we have it
4 all there.

5 MS. RICE: We'll do that, your Honor. No
6 problem.

7 THE COURT: Thanks.

8 MS. RICE: Good afternoon. As *Bruen* noted,
9 firearms restrictions are an active response to a
10 particular general societal problem that exists at the
11 time that that regulation was enacted. Today, Rhode
12 Island's large capacity feeding device restriction was
13 enacted in response to mass shootings and gun violence
14 enabled by an unfettered civilian access to weapons and
15 weapons accessories that are most well-suited for war.
16 That problem continues today. Since the State's
17 opposition was filed, there had been numerous incidents
18 involving large capacity magazines. Probably the most
19 notable occurred on October 24th where there was the
20 school shooting in St. Louis, Missouri, that left two
21 killed, four who were shot and injured. Recovered at
22 the scene were over 600 rounds of ammunition and 12
23 30-round large-capacity magazines. Just up the road in
24 Raleigh --

25 THE COURT: Can I interrupt you, Ms. Rice.

1 Didn't *Bruen* teach us or at least the dissent in *Bruen*
2 believed that *Bruen* teaches us that current analysis
3 that the Supreme Court requires doesn't have a place
4 for considering public safety as part of the
5 constitutional analysis. It does on the takings
6 clause, but on the Second Amendment part didn't *Bruen*
7 wipe that out of what was then the *Heller* analysis?

8 MS. RICE: So *Bruen* certainly got rid of the
9 tight nexus of means and scrutiny that evolved in
10 post-*Heller* circuit court precedent, but it did not
11 take away the fact that regulations enacted in response
12 to facts on the ground. That's what history and
13 tradition are made out of.

14 THE COURT: Right. But if facts on the ground
15 showed that it was dangerous for people to keep a
16 single-shot revolver in their home, *Heller* would strike
17 that down under the Second Amendment. That's not part
18 of the analysis anymore.

19 The part of the analysis is does the Second
20 Amendment apply, textual analysis; secondly, based on
21 case law that the (indecipherable) I think it's pretty
22 clear as to they're for self-defense, and then if not
23 then you go into the full Second Amendment analysis,
24 right, of historic tradition, however that's going to
25 play out over the years in the analysis that way,

1 doesn't it? I mean...

2 MS. RICE: Certainly I agree that there are two
3 steps in scope on the Second Amendment and then we get
4 to history and tradition. It's not unless you get to
5 history and tradition that facts really come into play.
6 But I would submit that even *Heller* needs to be
7 justified under that historic and tradition analysis
8 that both *Bruen* and *Heller* ultimately went through. So
9 when we're talking about the facts, we're looking at
10 societal historic facts. We're looking at are the
11 facts analogous in history to the times that we imposed
12 regulations and --

13 THE COURT: Can I ask you the same question I
14 asked Mr. Kelly, which is the overriding difficult
15 issue when one has to sit and figure out how one
16 analyzes under this new Supreme Court opinion, which is
17 how are district courts, how am I to deal with
18 competing affidavits that in many instances say the
19 exact opposite? How is this Court based on those
20 affidavits to evaluate the information that each side
21 submits?

22 MS. RICE: Your Honor, that's certainly a
23 difficult problem, but *Bruen* gives us some hints. It
24 talks about party presentation of the evidence, and I
25 think that our system is prepared to look through party

1 presentation of the evidence of competing experts. We
2 do it in other contexts all the time. The difference
3 here is that the experts are historians. That is a
4 little bit odd; we don't have a lot of other areas of
5 the law with which I'm familiar where the expert
6 evidence is being presented by historians.

7 I think there's another danger there, which is
8 that the Court obviously and lawyers are usually pretty
9 interested in history and have some ability, unlike say
10 perhaps soil samples, to do their own digging in the
11 historic record. But that impulse needs to be resisted
12 because this issue, just like any other, needs to be
13 decided through the normal mechanisms of party
14 presentation. And I think our normal mechanisms also
15 answer why it's so difficult now here at preliminary
16 injunction to look at these two sets of competing
17 affidavits. But fortunately we still have our
18 traditional preliminary injunction standard to help us
19 out.

20 So under the standard for review for preliminary
21 injunction, The Plaintiffs are never awarded injunctive
22 relief as of right, and they're required to make a
23 showing of a strong likelihood of success on the
24 merits. So in the event that the Plaintiffs have
25 not -- there is equipoise between the two evidentiary

1 records, then the Plaintiffs have not made that strong
2 likelihood of success on the merits and the case can
3 continue on to develop the facts further so that
4 hopefully in the end you wouldn't have balanced
5 competing affidavits.

6 THE COURT: So let's -- thank you, that was
7 actually helpful to begin to think about this. Let's
8 jump to the first what I'll call preliminary question
9 that I questioned Mr. Kelly about, which is, is a
10 magazine an arm or an accoutrement -- or an
11 accoutrement, depending on who you ask how to pronounce
12 it, or whether you're French or not.

13 First of all do you think that's, is that an
14 appropriate distinction and, if so, why is a magazine
15 in the State's opinion an accoutrement and not an arm?
16 And let me throw in to respond to Mr. Kelly's argument
17 where Justice Thomas said the bullet is part of the arm
18 because without a bullet you can't have a gun.

19 MS. RICE: Certainly, your Honor, and thank you.
20 So the State does believe that it is extremely relevant
21 whether or not something is an arm or an accoutrement,
22 and that's because we've been tasked with *Bruen* to
23 start with the text of the Second Amendment, and the
24 text of the Second Amendment is clear. In *Heller* the
25 court explained that the object of the Second Amendment

1 is arms. It then went on to look at a number of
2 historic definitions of arms, which are usually weapons
3 of offense or armor or defense, and anything that a man
4 wears for his defense or takes into his hands or uses
5 in wrath to cast out or strike another. So we really
6 have something that can be used to hurt someone.

7 Now, as to why the State believes that a
8 large-capacity magazine is not an arm, we just saw an
9 example, a very common example of a large-capacity
10 magazine, and when you pick it up, it is not something
11 that you can immediately use to injure somebody else
12 any more than you could a stapler or something that
13 everybody would accept is not an arm.

14 THE COURT: But doesn't that argument also apply
15 to bullets?

16 MS. RICE: This is where I think a distinction
17 needs to be made about the burden on the Second
18 Amendment right and the Second Amendment right itself.
19 So the Second Amendment, the scope of the Second
20 Amendment covers arms. You can burden that right by a
21 regulation that might not have as its direct object to
22 arms. You see this in the First Amendment context as
23 well where you get indirect burdens sometimes. So you
24 could have a burden on the Second Amendment by
25 regulating bullets. It would be an indirect burden.

1 You could similarly have, say if you did bar magazines
2 entirely perhaps at some point and there was no
3 technical alternative to feeding bullets, then you
4 might have an indirect burden on the right to bear
5 arms, the firearm, the actual weapon itself. But that
6 doesn't mean that the bullet or the large-capacity
7 magazine is in the scope of the Second Amendment, if
8 that makes sense.

9 THE COURT: It absolutely does. Thank you.

10 MR. KELLY: Okay. And I think that's really
11 important because we do regulate bullets. Rhode Island
12 has a law that prohibits armor-piercing bullets, for
13 example, so there are times of regulations that the
14 state and federal government have made on various
15 munitions. There are other kinds of bullets that have
16 import restrictions. There are just very many examples
17 where you're going to have this question of like what
18 exactly is a firearm, and it's a complex one. The ATF
19 has many, many regulations about what makes up a
20 firearm. The federal register is full of discussion
21 about this. I think at the moment it is the lower
22 register of the gun that defines what is and is not a
23 firearm, and so that epistemological question of what
24 is a firearm is complicated.

25 But I think, here, it's not so complicated. A

1 large-capacity magazine clearly is not a firearm.

2 THE COURT: Again, I have no factual knowledge
3 of guns, so you all with more knowledgeable can correct
4 me. But if they did or could manufacture a gun that
5 had a permanent magazine attached into it in excess of
6 10 rounds, is that prohibited under the Rhode Island
7 statute?

8 MS. RICE: So the Rhode Island statute has
9 exemptions that would exempt almost all existing
10 firearms or if not all -- we were not, the State was
11 not able to definitively rule out the fact there might
12 be one or two types of firearms that might be in that
13 configuration that you're talking about. But primarily
14 the configuration would be something with an integrated
15 magazine, and we talk about it here, a tubular
16 magazine. Those are kind of -- I've been told they're
17 Boy Scout guns, that they're ones the Boy Scouts use
18 for shooting practice or others use for shooting
19 practice. So those are exempted and not included in
20 the ban. Other kinds of guns that generally have that
21 type of an integrated magazines are bolt action
22 shotguns, or perhaps lever actions, something that's
23 not actually semi-automatic. This restriction is
24 two-fold. You have to have a semi-automatic firearm
25 and a large-capacity magazine combined to trigger the

1 ban on the large-capacity magazine, so if the weapon
2 itself is not semi-automatic then the Large Capacity
3 Feeding Device Ban does not apply. Oftentimes also,
4 it's my understanding that those integrated magazines
5 in other applications don't hold more than 10. So that
6 was what we were able to discover. That's backed up by
7 the affidavit of Mr. Troiano who avers that most
8 firearms would not be in that configuration of an
9 internal magazine.

10 THE COURT: I think he testified before me once.

11 MS. RICE: Probably, yes. And these are all
12 extremely helpful questions.

13 THE COURT: Let's jump to the second, for lack
14 of a better term, preliminary analysis issue, and that
15 is whether the Second Amendment is for the purposes of
16 self-defense, and how do you respond to Mr. Kelly's
17 argument that a shotgun in the home in the bedside
18 stand with, you know, a 15-round magazine in it isn't
19 appropriate for self-defense from an intruder into the
20 home.

21 MS. RICE: I think it is important to understand
22 why a gun would have a 15-round magazine in it, and
23 that's because of marketing. It's a commercial choice
24 that guns began to be sold with these larger capacity
25 magazines. There is no evidence in this record at all

1 that self-defense requires the use of more than 11
2 bullets, because you can have one in the chamber, and
3 it's been the uniform experience of courts that have
4 considered this matter that they have not found
5 evidence that more than 10 rounds are useful for
6 self-defense. And again, we have the affidavit of
7 Mr. Troiano on that point as well, that even law
8 enforcement officers almost never fire even 10 rounds
9 in offensive cases. And you can look in other cases,
10 other records, and you'll see the same set of evidence.
11 There have been statistical analyses, published studies
12 in medical journals that all come to the same
13 conclusion, and that is that there are very few and
14 sometimes no, depending on what database you're looking
15 at, instances where people successfully use more than
16 10 rounds in self-defense. There's maybe a handful of
17 incidents that have come up through the decade of
18 litigation on this issue. And it is very clear that
19 the question is whether the proscribed weapons are in
20 common use for lawful purposes like self-defense.
21 That's a direct quote from *Worman*, our First Circuit
22 case.

23 THE COURT: How applicable or how controlling is
24 *Worman* to me now in light of -- I think it was one of
25 those remanded post-*Bruen*. So just this is purely like

1 a legal wonky question, but how am I controlled by
2 *Worman* when it's in that procedural setting.

3 MS. RICE: Yes, your Honor. I would say that
4 you probably are not probably controlled by *Worman* at
5 this point, that it is in the process of being vacated.
6 But that doesn't mean that it can't be persuasive, and
7 it also doesn't negate the fact that you can take
8 judicial notice of the many myriad published opinions
9 of factual findings that all courts come to on this
10 issue.

11 And I think another interesting point that
12 *Worman* and also *Friedman* in the Seventh Circuit --
13 which I do not think was vacated -- make is that this
14 issue of dangerous and unusual really does hinge on the
15 use of for self-defense. It can't be mere numerosity.
16 It can't be the fact that there are just many, many,
17 many of an object that are the controlling test for
18 whether or not it's unusual.

19 THE COURT: Why wouldn't it be controlling as to
20 the unusual or at least a factor in determining
21 unusual? I understand it's not a factor in the
22 dangerousness part of that, but why wouldn't numerosity
23 be relevant to whether an object is usual or not?

24 MS. RICE: I wouldn't go so far to say it's not
25 relevant, but it's not controlling, and that's because

1 if it were controlling many of the decisions wouldn't
2 make senses. The ban on machine guns, for example,
3 wouldn't make sense because Tommy guns like were
4 already in widespread use at the time that they were
5 banned; and it doesn't make sense because it gives the
6 legislature the severe perverse incentive to ban all
7 new technology as soon as it comes on the line; and
8 that's kind of what the Seventh Circuit in *Worman*,
9 their reasoning shows is that it's very difficult to be
10 consistent. It's kind of a -- that would mean that
11 your constitutional rights were at the whim of the
12 marketplace, and there's no other constitutional right
13 that we allow that to happen. So I think that it needs
14 to have very little relevance.

15 You can also look at the numbers at issue in
16 *Caetano* and the numbers at issue in the bump stock ban.
17 So we have Plaintiffs who --

18 THE COURT: I'm trying to get my head my around
19 what a bump stock is, but you don't have to go into it.
20 It's not a clear definition of bump stock when one does
21 a peripheral look at the internet to see that's what it
22 means.

23 MS. RICE: I just think that that's true, that's
24 one of the things about gun regulation is that because
25 we're talking about kind of a mechanical object there

1 are many different ways that you can modify it and
2 therefore it's hard to define; you get back to this
3 sort of philosophical epistemological what is a gun
4 issue. But for -- in terms of looking at Tasers, it
5 was around 200 to 300,000 is what Justice Alito cited
6 to as being in common use for self-defense, whereas
7 bump stocks was many more hundreds of thousands for
8 that. And Plaintiffs even concede that bump stocks
9 probably are permissibly regulated under the Second
10 Amendment. So it can't turn on the actual number in
11 circulation.

12 And the State has offered a theory about how we
13 can think about dangerous and unusual, and that is how
14 is the weapon used in its social context. And you see
15 this in regulations that *Bruen* held up as probably
16 constitutional, like concealed carry. If you look at
17 the history of open carry and concealed carry, and you
18 look at *Bruen* analysis of those laws you see that *Bruen*
19 notes when the statute of North Hampton was enacted
20 there was societal unrest. When concealed carry was
21 prohibited of pistols in East New Jersey was
22 prohibited, that was a reaction to societal unrest.
23 And that pattern marches on through Reconstruction into
24 Post-Reconstruction into the regulation of
25 semi-automatic weapons by capacity, which started in

1 1927. So for each of those time periods you see that
2 societal unrest and some perception that there was an
3 imbalance or unfairness in people's ability to defend
4 themselves because of the excessive fire power, there's
5 regulation to curtail the use of those kinds of
6 weapons. And that's exactly what we have here today is
7 the curtailment of use of automatic, semi-automatic
8 weapons that we know are constitutional from *Heller* by
9 limiting the capacity of those weapons through this
10 regulation.

11 It's only if the Court finds that these
12 large-capacity magazines are in fact arms, and if the
13 Court finds that they are not dangerous and unusual
14 that we get down to the *Bruen* text and history
15 analysis. And it is there that a closer read of the
16 relevant history and tradition is required. But there
17 is no need to find a dead ringer analogue for the
18 regulation. You don't need to find an historic
19 regulation that banned capacity of firearms in the
20 Founding Era, and in fact it would - - -

21 THE COURT: Says who?

22 MS. RICE: Says *Bruen*. That specifically said
23 that we need a well-established and representative
24 historical analogue, not an historical twin and said
25 that you would not necessarily find a dead ringer;

1 instead we analogize the how and the why and find the
2 comparable burden and comparable justification.

3 And this is why you're not going to find in the
4 Founding Era a limit on capacity. We talked a little
5 bit about the content of the affidavits on what kinds
6 of firearms existed at the Founding, and I would submit
7 that what kinds of firearms that existed at the
8 Founding isn't in real factual dispute here, but what
9 is disputed is what does the existence of each of those
10 firearms mean in terms of if there was an experimental
11 idea for a gun or a prototype, one of which survives in
12 the Smithsonian, does that have relevance to the
13 absence of regulation, and we would submit that it does
14 not. There was no widespread use. We don't have
15 evidence of wide-spread use from Ms. Hlebinsky's
16 affidavit. We have one instance in which the Giardoni
17 air rifle was used. If you look at the sources, you
18 see that the Lewis and Clark Expedition only used that
19 rifle in the broadest sense. They brought it as an
20 example of European technology to show it off.

21 And, you know, we know this also from our
22 general knowledge of history, but in our affidavits we
23 talk about how at the time most people had black powder
24 weapons, and these weapons themselves are black powder
25 weapons; very difficult to load, you couldn't keep them

1 loaded in your home. They were very rarely used. Even
2 when people committed murder they were only used in
3 about 10 or 15 percent of murders, any gun, any
4 firearm. So we didn't have this problem of widespread
5 gun violence or murder by guns. And it turns out too
6 that around the Founding there was a period of relative
7 social harmony at least in the North, so it's another
8 reason why you're not going to find historical
9 analogues from that time.

10 When you do start to see historic analogues is
11 when you have a period of societal unrest, and there
12 are in fact technological advances that show this
13 difference in firepower that we've been talking about,
14 and that's during Reconstruction. There is some I
15 think tension between the two affidavits here as well,
16 but most of that can be explained if you drill down on
17 the time period.

18 So we know that immediately prior to
19 Reconstruction and during the Civil War and immediately
20 prior to the Civil War, there were many racist gun
21 restrictions enacted in slave holding states; but these
22 are not gun restrictions to which we ask the Court to
23 analogize? Everyone agree or -- we agree and that
24 those restrictions are not appropriate analogues.
25 Instead, we look at the actual history of

1 Reconstruction. That's after the Civil War is over,
2 when the Fourteenth Amendment is being ratified by the
3 states, and when the United States Army is working very
4 hard to protect these new-found and hard-won rights for
5 Black Americans; and it's that period of time that we
6 have shown that there is a regulation of these guns
7 through enforcement, that the state militias, the Army
8 worked very hard to keep these larger capacity more
9 powerful weaponry out of the hands of the
10 insurrectionists. They intercepted shipments. They
11 made sure that these guns were not going to the KKK.

12 THE COURT: Is enforcement equal in our analysis
13 of historic tradition with regulation and statute?

14 MS. RICE: I would say that regulations and
15 statute do not have to be just the written regulations
16 and the written statutes. The court looked very
17 closely at the common law when it talked about the
18 history of regulation in both *Bruen* and *Heller*, and the
19 common law is in part made up of enforcement. At the
20 time -- and this is still history that is being
21 uncovered and researched. As we speak people are
22 starting to unearth the court records, things like
23 grand jury records and other arrest records as kind of
24 we are looking; it's newly relevant history that people
25 have not necessarily done before.

1 But yes, this enforcement at the time, we're
2 talking about a period of extreme societal unrest and
3 it can happen. It explains kind of how are these
4 weapons treated at the time, who had access to them and
5 why, and only certain limited populations, mostly law
6 enforcement, had access to the weapons. And why,
7 because they were viewed as dangerous and unusual at
8 the time and so there was concerted action by the
9 government to restrict them.

10 We don't talk about the First Amendment only in
11 terms of published regulation or published law. We
12 look to see how governments actually treat speakers
13 before them as well. So I would think that, yes,
14 enforcement would also be a good source.

15 So we do have -- Dr. Vorenberg's affidavit goes
16 into a lot of detail on this, which I could never hope
17 to repeat here so I will not attempt to do that.

18 THE COURT: I was actually fascinated by it as
19 an historic piece.

20 MS. RICE: Yes, / so, but that was --

21 THE COURT: I'm not saying like it's relevant to
22 the analysis. I'm not saying...

23 MS. RICE: Understood, your Honor, yes. But we
24 do believe that that is relevant to the analysis and we
25 do believe that it's important to note that all of that

1 enforcement action was being taken in defense of Black
2 Americans' right to arms self-defense. Black Americans
3 at the time for the first time were getting access to
4 Second Amendment rights, and those rights were
5 vindicated with weapons that were less powerful than
6 the Henrys and the Winchesters at the time.

7 Of course technology keeps going, so, you know,
8 shortly thereafter we're going to get to a period of
9 time where there are more powerful weapons than the
10 Henrys and the Winchesters when semi-automatics come on
11 the scene, because those rifles were bolt action, so
12 they were not semi-automatic, and so if anyone has one
13 hanging around today they wouldn't be covered by the
14 large-capacity magazine ban. But at the time they were
15 dangerous and unusual. As throughout history dangerous
16 and unusual weapons were regulated, they were
17 regulated, and when they were displaced with even more
18 powerful weapons, those weapons were also regulated
19 first in the hunting context and then in bans that 13
20 states passed between 1927 and 1934, and then the
21 federal government began to ban machine guns. So you
22 see that arc repeating itself.

23 I think one other thing that I wanted to address
24 was the issue of whether sporting could be a part of
25 the Second Amendment right. It is, of course, the

1 State's position that we know from *Heller* and we know
2 from *Bruen* that that's not the case; that's
3 self-defense. There was a Seventh Circuit case, *Ezell*,
4 that we do cite to in our briefing that made some
5 reference to a corresponding right to acquire and
6 maintain proficiency in the use of weapons, but there's
7 nothing about the large-capacity magazine ban that
8 would implicate that in any event because you can take
9 your firearm that you own to the gun range and fire any
10 number of bullets to your satisfaction and go home and
11 watch the football game. That's all permitted under
12 this regulation.

13 THE COURT: So when one looks perhaps only in
14 the takings analysis, but when one looks at the public
15 safety aspect of this ban, the benefit to the public
16 that supports it is really pause a moment; right?

17 MS. RICE: Yes.

18 THE COURT: And the amount of time it takes for
19 a shooter to switch magazines, ending one, starting
20 another, is the benefit of this ban; right?

21 MS. RICE: That's the benefit of the ban. And I
22 think you can see that discussed at length in the
23 *en banc* opinion in *Colgate* which really gets into the
24 detail of all of the events that have happened where a
25 chance would have helped. So the Newtown report

1 demonstrates that. There's evidence from the Las Vegas
2 shooting that people ran for cover during pauses in
3 magazine changes. And that was a shooter who was very
4 skilled, had a lot of ability.

5 THE COURT: What do you say to Mr. Kelly's
6 argument that the marksmen or, you know, marksmen
7 oftentimes within a second or two can change the
8 magazine. What is the public benefit there?

9 MS. RICE: Sure. Two things. A second or two
10 could really mean the difference between someone being
11 able to take an action -- run, flee, hide -- and not,
12 because not all people involved in the incident are
13 going to be targeted at the same time. Second, that
14 public policy is imperfect. The court recognizes that,
15 you know, in *Jacobson*, as long ago as that, we kind of
16 realize that legislatures have to be free to legislate
17 for public safety, that when constitutional rights
18 aren't in place, so like if we're not infringing on the
19 Second Amendment right we only need to come up with the
20 rational basis. We only need to show that there's some
21 conceivable connection so that we can experiment and
22 bring, bear out that federalistic experiment that the
23 Founders envisioned. And I think that that's very
24 important. There are a limited tools, and rightly so.
25 That's the structure of our government. The government

1 in the United States is limited. So what the
2 government can do to protect public safety within those
3 tools, they need the full span, and whether or not it's
4 actually successful is exactly the analysis that *Bruen*
5 told us we could no longer look at. That nexus between
6 means and ends is no longer relevant to the Second
7 Amendment.

8 THE COURT: Let's jump into the takings, and can
9 you, using *Ocean State Tactical* in particular, who
10 Mr. Kelly represents, has an inventory of, if the
11 injunction doesn't go forward is useless supplies that
12 the government through its regulation has determined
13 from a profitable expect to a zero sum aspect for them.
14 How is that not a taking?

15 MS. RICE: Sure. So there's kind of two points
16 there. The first is that the public safety exception
17 does apply.

18 THE COURT: I realize that maybe I shouldn't
19 have said exception because it's not really an
20 exception; it's a definition of taking. But get at
21 the -- putting that aside for a second, why isn't that
22 a Fifth Amendment taking?

23 MS. RICE: Sure. So we're, again, not talking
24 about a seizure, which is very important in the
25 analysis. There's a different standard that applies.

1 Here -- and it's a full economic taking, taking of all
2 the economic value when you're talking about personal
3 property as regulatory, it's not a seizure of property.

4 And here, there's residual economic value that
5 is still available. Even if there's no market, there
6 is the ability retained in the law for Ocean State
7 Tactical to sell this excess inventory out of state.
8 Ocean State Tactical can take that capital asset and
9 modify it themselves. So they have the ability to sell
10 out of state already because of they're a
11 federally-licensed firearm dealer. And again, we're
12 here on an injunction, and Ocean State Tactical has not
13 put in any evidence that this is an existential threat
14 to their business. The evidence that they put in about
15 revenue just was not enough to get them over that
16 threshold, and so an injunction is not warranted under
17 the standard because it's fully remediable by monetary
18 damages at the end of the case.

19 THE COURT: Or irreparable harm.

20 MS. RICE: And you wouldn't be alone if you
21 found that this kind of a law left residual value.
22 That's exactly what the Third Circuit found in the
23 *Association of New Jersey Rifle and Pistol Clubs v. The*
24 *Attorney General of New Jersey*. And there was another
25 district court in California, *Weise*, that found that a

1 similar ban was not a taking, not on the public safety
2 rationale, which is what *Bonta* found, but on this other
3 issue. And in fact that's also -- I think that that
4 was the grounds for *Fesjian*, which is the machine gun
5 takings case as well.

6 THE COURT: Am I bound by the legislature's
7 finding of public safety in promulgating this
8 regulation when one analyzes the takings aspect of
9 this? In other words do I accept the fact that the
10 policymaking arm of government, the legislature,
11 determined that it was a public safety reason for its
12 passage and ergo not a taking? Or is mine an
13 independent analysis that I look outside of that for
14 determination?

15 MS. RICE: I do think that it would be --

16 THE COURT: There's language somewhere, I forget
17 where it's from, I don't know if it was from -- it was
18 from some of the takings cases that you all cited where
19 it seemed to imply great deference if not almost
20 adherence to the policymaking branches for that
21 determination.

22 MS. RICE: Yes, I think that's right that great
23 deference is owed. That is the standard. Let's see.
24 Yes, so I mean that is the standard all the way back to
25 1887 in *Mugler v. Kansas* that --

1 THE COURT: Excellent.

2 MS. RICE: -- that are declared by valid
3 legislation to be injurious to the health, morals or
4 safety of the community cannot in any just sense be
5 deemed a taking.

6 THE COURT: That was exactly the quote I was
7 thinking of because it says as determined by the
8 legislature.

9 MS. RICE: By the legislature. So I think that
10 that is definitely where you're starting from. And
11 think about it. This happens kind of with fair
12 frequency of probably -- and *Duncan* spoken about this.
13 Every time a new drug is manufactured, like we get a
14 designer on the scene and it's added to the schedule,
15 there's a period of, there's a lag period between the
16 time the drug is invented, like synthetic marijuana,
17 and the time that it is added to the Controlled
18 Substances Act Schedule; and in between that time
19 people lawfully possess that substance, that chemical,
20 and automatically when that is added it's contraband.
21 People are not entitled to a taking for the loss of
22 their property in those banned chemicals. So this
23 happens quite often. It's not really an unusual event
24 that the legislature would deem something to be
25 injurious to the public.

1 THE COURT: Is there any evidence that you know
2 of that the legislature considered compensating folks
3 like Ocean State Tactical and perhaps citizens for the
4 value of the illegal magazines?

5 MS. RICE: The only legislative history that I
6 know of -- and we did examine this in coming up with
7 our arguments here -- is the hearing at which the Chief
8 of Police for the Providence Police Department
9 testified, so that is linked in our briefing.

10 THE COURT: I read it. Colonel Clements'
11 testimony.

12 MS. RICE: Yes. And other people testified at
13 that time in the committee. But there is no other
14 (indecipherable) legislative history. The Rhode Island
15 General Assembly does not keep written records of that.

16 THE COURT: Probably a good thing.

17 MS. RICE: At least a good thing for those whose
18 job it is to keep voluminous records.

19 THE COURT: Ms. Rice, why don't you wrap up.

20 MS. RICE: Thank you, your Honor.

21 So as you can see from this argument, these are
22 very important and pressing issues of public importance
23 balancing the Second Amendment rights that people have
24 to defend themselves with firearms, with reasonable
25 public safety measures that protect us all from those

1 lone actors and criminals that would seek to abuse
2 those rights. And we submit we think there's a lot of
3 evidence here that this kind of restriction on an
4 accessory is a way to make that balance appropriately,
5 and we would urge you therefore to deny the preliminary
6 injunction at this time.

7 THE COURT: Thanks. Well, I'm not going to do
8 either at this time. I'm going to get you a decision
9 as soon as I can; hopefully before the statute requires
10 the alleged taking part to go into effect. We'll act
11 as quickly as we can.

12 Mr. Kelly, do you want your -- I don't see any
13 reason to keep this (gesturing).

14 MR. KELLY: If I could have one minute to reply
15 to some of the questions you asked me.

16 THE COURT: No. As I said, everything was
17 briefed very well, and I promised my staff I would
18 limit it.

19 MR. KELLY: Would it be possible to file just a
20 short 10-page supplement to address some of the issues
21 you raised?

22 THE COURT: You are always welcome to request
23 further brief, sure.

24 MR. KELLY: Would you like me to do that by
25 motion, your Honor, or...

1 THE COURT: I would like you to; unless the
2 State wants to allow short supplemental.

3 MS. RICE: We would not agree to that.

4 THE COURT: Why don't you do it by motion,
5 Mr. Kelly. Do a motion with it attached.

6 MR. KELLY: Thank you.

7 THE COURT: Thanks. Again, I couldn't be
8 prouder to be a member of this Bar with the advocacy
9 that's taking place by both sides. It was outstanding.
10 I tell everyone that sometimes that makes my job
11 easier, but more often than not like this it makes my
12 job a heck of a lot harder, so thank you to all
13 counsel.

14 MR. KELLY: Thank you, your Honor.

15 MS. RICE: Thank you, your Honor.

16 (Adjourned)
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C E R T I F I C A T I O N

I, Denise P. Veitch, RPR, do hereby certify
that the foregoing pages are a true and accurate
transcription of my stenographic notes in the
above-entitled case.

/s/ Denise P. Veitch
Denise P. Veitch, RPR
Federal Official Court Reporter

January 6, 2023
Date